IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 30, 2006 Session

DOROTHY OWENS, As Conservator of MARY FRANCIS KING, an incapacitated person v. NATIONAL HEALTH CORPORATION, ET AL.

Direct Appeal from the Circuit Court for Rutherford County
No. 51377 Robert E. Corlew, Judge

No. M2005-01272-COA-R3-CV - Filed on June 30, 2006

In this appeal, we are asked to determine whether the circuit court properly denied the defendants' motion to compel arbitration. The circuit court found that a patient's attorney-in-fact for health care decisions could not validly execute a nursing home admission contract containing an agreement to arbitrate on behalf of the patient. On appeal, the appellants contend that the attorney-in-fact could validly execute the admission contract on behalf of the patient based on the language of the durable power of attorney. The patient's conservator argues that signing a waiver of a jury trial is beyond the scope of the attorney-in-fact's authority. Additionally, the patient's conservator contends that, if the contract is valid, this Court should affirm the circuit court's decision because the agreement to arbitrate included within the admissions contract is unenforceable as a matter of law. We reverse and remand to the circuit court for the entry of an order compelling arbitration.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ALAN E. HIGHERS, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and DONALD P. HARRIS, S.J., joined.

John B. Curtis, Jr., Bruce D. Gill, Chattanooga, TN, for Appellants

Brian G. Brooks, Richard E. Circeo, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On August 5, 2003, Mary Francis King ("King") signed a durable power of attorney for health care ("Power of Attorney") naming Gwen C. Daniel ("Daniel") as her attorney-in-fact for health care decisions.[1] In the Power of Attorney, King vested Daniel with the power to assist her in making health care decisions and to make those decisions on King's behalf if she was incapacitated or otherwise unable to make these decisions. The Power of Attorney also included a provision granting Daniel "the power and authority to execute on [her] behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that [the Power of Attorney] authorizes [her] Attorney-In-Fact to assist [her] to make, or to make on [her] behalf."

On August 26, 2003, Daniel and John Smith ("Smith") admitted King ("King") to a nursing home facility, National Health Corporation d/b/a NHC Healthcare-Murfreesboro ("NHC-Healthcare"), in Murfreesboro, Tennessee. When Daniel and Smith admitted King to the nursing home facility, Daniel and Smith signed an admission and financial contract (the "Contract") with NHC-Healthcare. The Contract contained a provision requiring arbitration for any claim brought on behalf of King against NHC-Healthcare. The arbitration provision contained a clause stating that "[t]he agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed," which in this case was Tennessee.

On February 10, 2005, Dorothy Owens ("Owens" or "Appellee"), acting as conservator for King, filed suit against NHC-Healthcare, National Healthcorp, L.P. ("NHLP"), National Health Realty, Inc. ("NHR"), NHC, Inc. a/k/a NHC, Inc.-Tennessee ("NHC"), and NHC/OP, L.P. ("NHC/OP" or collectively with NHC Healthcare, NHLP, NHR, and NHC, the "Defendants" or "Appellants") alleging, inter alia, negligence on the part of the Defendants in the care provided to King. In the complaint, Owens alleged that King was of unsound mind during the entire term of her residency at the nursing home. In lieu of an answer, the Defendants filed a motion to compel arbitration and to stay proceedings citing the arbitration provision in the Contract. Thereafter, the circuit court denied the defendants' motion to compel arbitration and stay proceedings.

[1] This Court is mindful that the Power of Attorney also named William T. Daniel as King's attorney-in-fact for health care decisions. Based on the language of the Power of Attorney, either Daniel or William T. Daniel could assist King with her health care decisions or make those decisions on her behalf if King was incapacitated. We further note that William T. Daniel was not involved in the events giving rise to this case.

II. ISSUE PRESENTED

Appellants have timely filed their notice of appeal and present the following issue for review:

1. Whether the circuit court erred when it denied Defendants' motion to compel arbitration and stay proceedings.

For the following reasons, we reverse the decision of the circuit court and remand to the circuit court for the entry of an order compelling arbitration.

III. STANDARD OF REVIEW

"The relationship between an attorney-in-fact and the principal is subject to the laws of agency." ***Stewart v. Sewell***, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *14 (Tenn. Ct. App. Apr. 14, 2005) (citing *Kerney v. Aetna Cas. & Sur. Co.*, 648 S.W.2d 247, 252 (Tenn. Ct. App. 1982); 3 Am.Jur.2d *Agency* § 23 (1986)). Thus, "[w]here the authority has been conferred in writing, the nature and extent thereof are questions of law for the court . . . ." 3 C.J.S. *Agency* § 588 (2003). "The interpretation of a contract is a matter of law . . . ." ***Teter v. Republic Parking Sys., Inc.***, 181 S.W.3d 330, 342 (Tenn. 2005) (citing *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 335-36 (Tenn. 1983)). This Court reviews conclusions of law *de novo* with no presumption of correctness for those findings. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

On appeal, Appellants contend that the chancery court erred when it failed to enforce the arbitration provision in the Contract. Specifically, Appellants argue that (1) the court did not have jurisdiction to entertain whether the Contract was enforceable; (2) the court improperly found that Daniel could not waive King's right to a jury trial; and (3) the court incorrectly found that King would be left without a remedy at law if the arbitration provision were upheld. Appellee contends that the circuit court's denial of Appellants' motion to compel arbitration should be upheld because even if the Contract is valid, the Contract is unenforceable as a matter of law. We address each contention in turn.

A. Jurisdiction

On appeal, Appellants contend that the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 1 *et seq.*, is the controlling law in this case and that under the FAA, the circuit court did not have jurisdiction to determine whether the Contract was valid. We disagree.

Although Appellants contend that the FAA is the controlling law in this case, the Contract stipulated that "[t]his agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of [Tennessee]." By stating that Tennessee law shall govern their

agreement for arbitration of "[a]ny claim, controversy, dispute, or disagreement," the parties have indicated that they intended that they would arbitrate all disputes arising out of the Contract to the extent allowed by Tennessee law. ***See Frizzell Constr. Co. v. Gatlinburg, L.L.C.***, 9 S.W.3d 79, 85-86 (Tenn. 1999); ***Whisenhunt v. Bill Heard Chevrolet, Inc.***, No. W2004-01745-COA-R3-CV, 2005 Tenn. App. LEXIS 418, at *17 (Tenn. Ct. App. July 12, 2005); ***City of Blaine v. John Coleman Hayes & Assoc.***, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1999). "Tennessee law contemplates judicial resolution of contract formation issues." ***Frizzell Contr. Co.***, 9 S.W.3d at 85. Thus, the parties in this case "have indicated their intention not to submit such issues to arbitration." ***Id.*** at 85. As such, the issue of the validity of the Contract as to the formation of the Contract was properly before the circuit court.

B. Validity/Authority of Attorney-in-Fact

Next, on appeal, Appellants contend that the circuit court erred when it determined that Daniel did not have the authority to enter into the Contract on behalf of King.

When an individual executes a power of attorney, that individual "creates a fiduciary relationship [between that individual and] his attorney-in-fact governed by the laws of agency." ***Rogers v. First Nat'l Bank***, No. M2004-02414-COA-R3-CV, 2006 Tenn. App. LEXIS 97, at *37-38 (Tenn. Ct. App. Feb. 14, 2006) (citing *Stewart v. Stewart*, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *14-15 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending); *In re Estate of Mullins*, No. E2002-02094-COA-R3-CV, 2003 Tenn. App. LEXIS 261, at *4-6 (Tenn. Ct. App. Apr. 3, 2003) (no perm. app. filed); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2002); *Eaton v. Eaton*, 83 S.W.3d 131, 134-35 (Tenn. Ct. App. 2001)). Thus, "[o]ne acting pursuant to a durable power of attorney must act in the principal's best interests and within the scope of authority granted by the statute and the principal." ***Eaton***, 83 S.W.3d at 134 (footnote omitted).

Pursuant to the terms of the Power of Attorney, Daniel had the authority to execute on King's behalf any waiver, release, or other document which may be necessary to implement health care decisions that Daniel was authorized to assist or to make on King's behalf. Further, the Power of Attorney stated that all terms used in the Power of Attorney shall have the meaning as defined in sections 34-6-201 *et seq.* of the Tennessee Code.

Section 34-6-201(3) of the Tennessee Code defines "health care decision" as "consent, refusal of consent or withdrawal of consent to health care." Tenn. Code Ann. § 34-6-201(3) (2001). Further, section 34-6-201(2) of the Tennessee Code defines "health care" as "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition . .

. ." ***Id.*** § 34-6-201(2) (2001). As such, we conclude that consenting to care at a nursing home is a "health care decision."[2]

Thus, our analysis turns on whether Daniel's express authority to execute any necessary waiver, release, or other document on King's behalf to implement a health care decision, i.e., consenting to nursing home care, includes executing an admission contract that includes a waiver of a jury trial.

While no Tennessee court has decided this issue,[3] courts in other jurisdictions have decided similar issues. For example, in ***Garrison v. Superior Court of Los Angeles County***, 33 Cal. Rptr. 3d 350 (Cal. Ct. App. 2005), the Court of Appeals of California, Second District, Division Five found that, under California law, an agent may "enter into optional revocable arbitration agreements in connection with placement in a health care facility," finding that it was a "proper and usual" exercise of that agent's powers. ***Id.*** at 360. In *Garrison*, a patient's daughter, upon authority as the patient's attorney-in-fact for health care decisions, admitted the patient into a nursing home. ***Id.*** at 352-54. As part of the admissions process, the attorney-in-fact for health care decisions signed an arbitration agreement on behalf of the patient. ***Id.*** at 353. The power of attorney for health care decisions signed by the patient allowed the attorney-in-fact to make all health care decisions for the patient if the patient became incapacitated to the same extent as the patient would if the patient had the capacity to do so. ***Id.*** at 353-54. The power of attorney also gave the attorney-in-fact the power to execute documents involving the refusal to permit treatment or "to sign '[a]ny necessary waiver or release from liability required by a hospital or physician'" along with permission for reviewing and disclosing the patient's medical information. ***Id.*** at 354.

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[2] Section 68-11-201(25) of the Tennessee Code defines "nursing home" as "any institution, place, building or agency represented and held out to the general public for the express purpose of providing one (1) or more nonrelated persons who are not acutely ill, but who do require skilled nursing care and related medical services." Tenn. Code Ann. § 68-11-201(25)(A) (2001). Further, section 68-11-201(25) restricts the definition of nursing homes to "facilities providing skilled nursing care and related medical services to individuals, beyond the basic provision of food, shelter and laundry, admitted because of illness, disease or physical infirmity for a period of not less than twenty-four (24) hours per day." ***Id.*** § 68-11-201(25)(B) (2001). Given the definition of a nursing home, consenting to care at a nursing home would be consenting to a service that maintains, diagnoses, or treats an individual's physical or mental condition.

[3] This Court is mindful that several Tennessee cases have decided the issue as to the enforceability of arbitration agreements in a physician-patient agreement and in a nursing home-patient agreement. ***See, e.g., Buraczynski v. Eyring***, 919 S.W.2d 314, 321 (Tenn. 1996) (determining that agreements to arbitrate between physicians and patients are not against public policy and that the agreement in this case was not unconscionable); ***Howell v. NHC Healthcare-Fort Sanders, Inc.***, 109 S.W.3d 731 (Tenn. Ct. App. 2003) (holding that the agreement to arbitrate within a nursing home admission contract was unenforceable as it was unconscionable); ***Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.***, No. E2003-00068-COA-R9-CV, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003) (finding that husband did not have express or apparent authority based on his relationship with his wife to waive his wife's right to a jury trial and that the contract was unenforceable as it was unconscionable). In each of those cases, however, the issue of whether an attorney-in-fact may validly execute an admission contract containing an arbitration agreement based on the authority granted in the power of attorney was not entertained. ***See id.***

Likewise, in ***Briarcliff Nursing Home, Inc. v. Turcotte***, 894 So.2d 661 (Ala. 2004), the Supreme Court of Alabama held that two patients' fiduciary parties, one of whom was one of the patient's attorney-in-fact pursuant to a power of attorney, validly executed admission contracts containing an arbitration provision on behalf of the patients so as to bind the estates of those patients when bringing a wrongful death claim against the nursing home. ***Id.*** at 668.

Similarly, in ***Sanford v. Castleton Health Care Center, LLC***, 813 N.E.2d 411 (Ind. Ct. App. 2004), the Court of Appeals of Indiana, Second District found that a patient's attorney-in-fact under a limited durable power of attorney validly executed an admission contract containing an arbitration provision on behalf of the patient that bound the estate of the patient to arbitrate any tort claim against the nursing home, including a wrongful death claim. ***Id.*** at 422. In *Sanford*, the power of attorney granted the attorney-in-fact the authority to "'admit or release [the patient] from any hospital or health care facility.'" ***Id.*** at 414.

Unlike these cases, however, in ***Blankfield v. Richmond Health Care, Inc.***, 902 So.2d 296 (Fla. Dist. Ct. App. 2005), the Court of Appeals of Florida, Fourth District found that a health care proxy could not sign a waiver of a patient's rights to a jury trial. ***Id.*** at 301. In *Blankfield*, a patient's son, acting as the patient's health care proxy under Florida law, signed an admission agreement that included an arbitration agreement that waived the patient's right to a jury trial. ***Id.*** at 297. The court found that, under the current statutory scheme, the health care proxy did not have the authority to bind the patient to arbitrate any claims she might have against the nursing home as this was not a health care decision. ***Id.*** at 299-301. The Florida statutory scheme did not provide the health care proxy the authority to sign any waiver or release when implementing health care decisions. ***Id.*** at 301.

Although these cases are not binding on this Court, we find the reasoning in *Garrison*, *Briarcliff Nursing Home, Inc.*, and *Sanford* persuasive. As such, in this case, we conclude that an attorney-in-fact's authority to execute any necessary waiver, release, or other document for implementing health care decisions includes executing an admission contract which includes an agreement to arbitrate. Necessarily, when attempting to receive health care, an individual must arrange for what services he or she will receive from the health care provider and how he or she will pay for those services. Further, it is not uncommon for those same parties to agree as to which forum they will use to resolve their disputes. Thus, Daniel had the authority to enter into an admission contract that included an agreement to arbitrate. Accordingly, we conclude that the circuit court erred when it found that there was no agreement to arbitrate because Daniel lacked the authority to enter into an admission contract that included an arbitration agreement on behalf of King.

C. Enforceability

On appeal, Appellee has asserted that, even it this Court finds that the Contract is valid, this Court should uphold the circuit court's denial of Appellants' motion to compel arbitration because the Contract is unenforceable under applicable law and is unenforceable according to its terms. Specifically, Appellee asserts that the Contract is unenforceable because (1) it violates federal law;

(2) it is unconscionable; (3) Appellants breached their fiduciary duty to King; and (4) the Contract terminated upon King's discharge. Further, Appellee asserts that if the Contract is enforceable, it is enforceable against NHC-Healthcare only. Lastly, Appellant contends that the circuit court erred in finding that if the Contract was valid, it is unenforceable because King was left with no remedy at law. We address each contention in turn.

1. Compliance with Federal Law

On appeal, Appellee asserts that if the Contract was valid, it was unenforceable because it violates federal law governing consideration to a nursing home from a patient receiving Medicare and/or Medicaid.

Pursuant to section 1396r(C)(5)(A)(iii) of title 42 of the United States Code, a nursing facility must

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this title, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (2005). Likewise, section 483.12(d)(3) of title 42 of the Code of Federal Regulations states that

> [i]n the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (2005). Appellee asserts that, pursuant to these provisions, a nursing home may not require a patient receiving Medicare or Medicaid to enter into an agreement to arbitrate in order to be admitted into the nursing home because such agreement constitutes additional consideration.

While no Tennessee court has reached this issue, courts in other jurisdictions have decided this issue. For example, when faced with this same issue in ***Owens v. Coosa Valley Health Care, Inc.***, 890 So.2d 983 (Ala. 2004), the Alabama Supreme Court stated

> requiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement

> to admittance. Rather, an arbitration agreement sets a forum for future disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by statute.

Id. at 989. Likewise, in ***Broughsville v. OHECC, LLC***, No. 05CA008672, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), the Court of Appeals of Ohio, Ninth Appellate District, Lorain County concluded that requiring a nursing home admittee receiving Medicare or Medicaid to agree to arbitrate is not charging an additional fee or other consideration. ***Id.*** at *21-22.

Further, in ***Sanford v. Castleton Health Care Center, LLC***, 813 N.E.2d 411 (Ind. Ct. App. 2004), the Court of Appeals of Indiana, Second District, after employing the doctrine of ejusdem generis and concluding that the general phrase "other consideration" within section 1396r(c)(5)(A)(iii) of title 42 of the United States Code did not include an agreement to arbitrate, found that requring a nursing home admittee to agree to arbitrate did not violate section 1396r(c)(5)(A)(iii). ***Id.*** at 419.

Although these cases are not binding on this Court, we find their rationale persuasive. As such, we conclude that requiring a nursing home admittee that receives Medicare or Medicaid to agree to arbitrate any dispute he or she has with the nursing home is not charging an additional fee or other consideration.

2. Unconscionability

Further, Appellee asserts that if the Contract was valid, it is unenforceable because it is unconscionable.

As this Court has previously stated,

> [u]nconscionability has two recognized ingredients: an absence of the meaningful choice on the part of one of the parties (procedural unconscionability) and contract terms which are unreasonably favorable to the other party (substantive unconscionability). *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

Elliott v. Elliott, No. 87-276-11, 1988 Tenn. App. LEXIS 242, at *12 (Tenn. Ct. App. Apr. 13, 1988). Further,

> [a] court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889); *Christian v. Christian*, 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977). In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. *In re Friedman*, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978); *Collins v. Uniroyal Inc.*, 126 N.J.Super. 401, 315 A.2d 30 (1973), aff'd 64 N.J. 260, 315 A.2d 16 (1974). *See, e.g.*, G.S. 25A-43(c).

Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting *Brenner v. Little Red School House, Ltd.*, 274 S.E.2d 206, 210 (N.C. 1981)). The question of whether a contract or provision thereof is unconscionable is a question of law. ***Taylor v. Butler***, 142 S.W.3d 277, 284-85 (Tenn. 2004) (citing *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 435 n.12 (6th Cir. 1983)).

In ***Howell v. NHC Healthcare-Fort Sanders, Inc.***, 109 S.W.3d 731 (Tenn. Ct. App. 2003), this Court elaborated on the issue of unconscionability of an agreement to arbitrate in a nursing home context, stating:

> In *Buraczynski*, the Supreme Court addressed the issue of the enforceability of an arbitration agreement between a patient and doctor, and discussed the factors which should be analyzed in dealing with this issue. The Court said the agreement in that case was a contract of adhesion because it was offered to the patient on a "take it or leave it" basis, and because the doctor was in a position of greater bargaining power. *Id.* The Court noted, however, that while contracts of adhesion are not favored, the simple fact that the contract was one of adhesion does not necessarily render it unenforceable. *Id.* The Court then observed that enforceability "generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Id.* 919 S.W.2d at 320.
>
> The Court provided examples of arbitration agreements which were considered unconscionable or oppressive to the "weaker" party, such as where the arbitration clause was contained within a clinic

admission form and gave the patient no option to revoke the agreement and regain the right to a jury trial. *Id.* 919 S.W.2d at 320, citing *Pepper*, 101 Nev. 105, 693 P.2d 1259 (Nev. 1985). The Court stated that "courts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden . . . and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment". *Id.* 919 S.W.2d at 321.

The Court then examined the arbitration agreement at issue in *Buraczynski*, and concluded it was not oppressive or unconscionable because it was a stand-alone, one page contract, with an attached explanation of its purpose that encouraged the patient to ask questions, and which contained a "ten-point capital letter red type, directly above the signature line that 'by signing this contract you are giving up your right to a jury or court trial' on any medical malpractice claim." *Id.* 919 S.W.2d at 321. The agreement also provided that it could be revoked by the patient within thirty days. *Id.*

In *Cooper v. MRM Investment Co.*, 199 F. Supp. 2d 771 (M.D. Tenn. 2002), an arbitration was held unenforceable because the circumstances were such that the employee signed the agreement with the employer and the agreement contained no language stating the employee was giving up her right to a jury trial. That Court recognized that "the waiver of the right to a jury trial must be both knowing and clear". Further, the Court relied upon the fact that the employer had much greater bargaining power, and ultimately found that the agreement was oppressive and unconscionable. *Id.*

This Court held in *Brown v. Karemor International, Inc.*, 1999 Tenn. App. LEXIS 249 (Tenn. Ct. App. April 19, 1999), that the reasonableness of the provision could not be determined simply by looking at the agreement itself, and that the defendant who was seeking to enforce the provision had the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." *Id.*

Howell, 109 S.W.3d at 733-34.

We are cognizant that in each case determining the unconscionability of an agreement to arbitrate in a health care situation, the courts in those cases first determined whether the contract was one of adhesion. In this case, the circuit court made no factual findings as to whether the Contract was one of adhesion. Although no findings were made as to whether the Contract was an adhesion contract, even assuming that the Contract is an adhesion contract, we conclude that the arbitration provision within the Contract is not unconscionable. Although the arbitration provision is located

on pages nine and ten of the Contract, the section heading reads in bold: "DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER)." Further, the statement "BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT, STATUTORY, AND OTHER CLAIMS" is included prominently within the section in bold and in all capital letters. The arbitration provision, however, does not provide an explanation of the arbitration proceedings. At the end of the arbitration section, the patient or the patient's legal representative must sign acknowledging that they agree to the arbitration provisions described above, that the provisions were explained to him or her, and that he or she understands that he or she is waiving their right to a jury trial. Most importantly, the arbitration agreement did not change the nursing home's duty to use reasonable care in treating King, nor limit the nursing home's liability for any breach of that duty, "but merely shifted the disputes to a different forum." ***Buraczynski v. Eyring***, 919 S.W.2d 314, 321 (Tenn. 1996).

3. Breach of Fiduciary Duty

Next, Appellee asserts that if the Contract was valid, it was unenforceable because Appellants had a fiduciary duty to place King's interests above theirs and "to not entice her or her family to waive her constitutional rights in order to receive medical care." Therefore, Appellee contends that Appellants exerted some undue influence over King so that the Contract should be rendered unenforceable.

"[T]he existence of a confidential or fiduciary relationship, together with a transaction by which the dominant party obtains a benefit from the other party, gives rise to a presumption of undue influence . . . ." ***Matlock v. Simpson***, 902 S.W.2d 384, 385 (Tenn. 1995).

In this case, even assuming a fiduciary relationship exists between the parties, we cannot say that Appellants derived any profit from or advantage from having King arbitrate any claim she may have against Appellants. As we have stated earlier in this Opinion, an agreement to arbitrate is not other consideration or an additional fee. It is a neutral provision that establishes the forum for future disputes between the parties. Further, Appellee does not assert that electing to use this type of forum for future disputes unfairly advantages Appellants. Rather, Appellee contends that, if Appellant must arbitrate her claims, Appellant must pay a fee to arbitrate. We cannot see how Appellants gain an advantage or derive a profit from Appellee paying a fee to arbitrate. As such, we conclude that there has been no undue influence as to render the Contract unenforceable.

4. Termination Upon Discharge

Appellee also contends that, if the Contract is valid, that it is unenforceable because it terminated upon King's discharge.

Although, generally, a party to a contract is not bound to the terms of the contract once the contract has terminated, 17B C.J.S. *Contracts* § 448 (1999), when one party to a contract has a dispute against another party to the contract arising under the contract, the parties shall be bound to

the terms of the contract when resolving the dispute even though the contract has been terminated**,** ***S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359***, 186 F.3d 733, 738-40 (6th Cir. 1999); ***see also Litton Fin. Printing Div. v. NLRB***, 501 U.S. 190, 205-06 (1991); ***Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union***, 430 U.S. 243, 255 (1977). A dispute arises under a contract when the "majority of the material facts and occurrences" arise before the contract's expiration. ***S. Cent. Power Co.***, 186 F.3d at 740. In this case, while the Contract terminated when King was discharged from NHC-Healthcare pursuant to the terms of the Contract, all the underlying occurrences alleged by Appellee that she claims give rise to her negligence action occurred before the Contract was terminated. Pursuant to the terms of the Contract, any claim arising under tort or contract as a result of the performance of the Contract by NHC-Healthcare, which included any medical care provided to King, were to be arbitrated. Accordingly, we conclude that although the Contract terminated upon King's discharge, the parties were required to arbitrate any tort or contract claim arising under the Contract.

5. Agreement Applying Only to NHC-Healthcare

Fifth, Appellee asserts that, if the Contract is valid, only NHC-Healthcare may rely on the arbitration section as it was the only one of the Appellants who was a party to the Contract.

In this case, Appellee brought suit against NHLP, NHR, NHC, and NHC/OP based on their respective ownership of NHC-Healthcare.

"When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." ***J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.***, 863 F.2d 315, 320-21 (4th Cir. 1988); ***see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.***, 10 F.3d 753, 756-58 (11th Cir. 1993).

Given the facts of this case, if this Court were to allow Appellee to bring suit in circuit court against NHLP, NHR, NHC, and NHC/OP while arbitrating her claims against NHC-Healthcare, the arbitration proceedings would essentially be rendered meaningless and this State's policy in favor of arbitration would be frustrated. ***See Sam Reisfield & Son Import Co. v. S.A. Eteco***, 530 F.2d 679, 681 (5th Cir. 1976) (citing *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F. Supp. 1146 (S.D.N.Y.), *aff'd*, 486 F.2d 1394 (2d Cir. 1973)).

. As such, we conclude that, as a matter of law, all of the Appellants may rely on the arbitration section of the Contract.

6. Remedy at Law

Lastly, Appellant asserts that the circuit court improperly concluded that if the Contract was valid, Appellee was left without a remedy at law. Appellee contends that if the Contract is valid, the Contract is unenforceable because Appellee would be left without a remedy at law.

In its letter to the parties that it incorporated into its opinion by reference, the circuit court noted that the parties have stipulated that neither arbitral forum designated in the Contract would conduct an arbitration for Appellee's claims. Additionally, the circuit court stated that even if it found the Contract valid, it found that the Contract would be unenforceable because Appellee was left without a remedy at law. Appellee states that because the remedy provided for in the Contract is unavailable, the Contract is unenforceable as a matter of law. Alternatively, Appellants contend on appeal that under the FAA and the Tennessee Uniform Arbitration Act provide a remedy in this situation.

As we have stated earlier in this Opinion, Tennessee law governs the agreement to arbitrate in this case. Section 29-5-304 of the Tennessee Code states that

> [i]f the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Tenn. Code Ann. § 29-5-304 (2000).

Accordingly, we conclude that Appellee is not left without a remedy at law as she can apply to the circuit court for the appointment of one or more arbitrators.

V. CONCLUSION

For the foregoing reasons, we reverse the decision of the circuit court and remand to the circuit court for the entry of an order compelling arbitration. Costs of this appeal are taxed to the appellee, Dorothy Owens, as Conservator of Mary Francis King, an incapacitated person, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE